Heng Mui Pheow v Tan Ting Koon & Ors

HIGH COURT (SINGAPORE) — SUIT NO 1969 OF 1988 AND SUMMONS-IN-CHAMBERS NO 145 OF 1989
CHAN SEK KEONG J
1 JUNE 1989

Companies and Corporations — Derivative action — Action brought by minority shareholder — Company under judicial management — Whether plaintiff had capacity to bring derivative action — Companies Act (Cap 50, 1985 Ed), ss 227D, 227G & Sch 11

The plaintiff and the first defendant were equal shareholders and the only directors of the second defendants, a company. The plaintiff claimed that the first defendant had fraudulently obtained in his own name a tenancy of premises, which the shareholders had previously agreed to vest in the second defendants. The premises belonged to the third defendants. The plaintiff claimed, inter alia, a declaration that the tenancy was held in trust for the second defendants. The second defendants were placed under judicial management at this time. The third defendants then applied to court to set aside an ex parte order of court obtained by the plaintiff joining them as parties to the action, on the ground that the plaintiff, being a minority shareholder, had no capacity to bring what was in effect, a derivative action on behalf of the second defendants, who at the material time were in judicial management.

Held, allowing the third defendants' application:

(1) Under the Companies Act, the management of the second defendants vested in the judicial managers. They were the proper party to bring proceedings against the third defendants.

(2) Since the judicial managers had not been requested and hence had not refused to commence this action against the third defendants, the plaintiff's action was not one that fell within the established exceptions to the rule in *Foss* v *Harbottle*.[1]

Cases referred to
1 *Foss* v *Harbottle* (1843) 67 ER 189 (refd)
2 *Fargro* v *Godfroy* [1986] 3 All ER 279 (folld)

Legislation referred to
Companies Act (Cap 50, 1985 Ed) ss 227D, 227G, Sch 11

Susan Lim for the plaintiff.
George Lim for the second defendants.
Helen Yeo and *Harish Kumar* for the third defendants.

Cur Adv Vult

Chan Sek Keong J: This was an application by the third defendants to set aside an ex parte order of court obtained by the plaintiff joining them as parties to this action. The ground of the application was that the plaintiff, being a minority shareholder, had no capacity to bring what was in effect a derivative action on behalf of the second defendants which were at the material time under judicial management.

The application raised a novel point as to the effect of a judicial management order against a company made under Part VIIIA of the Companies Act (Cap 50, 1985 Ed) ('the Act') on the right of a minority shareholder thereof to commence an action against a third party who is alleged to have done a wrong to the company.

The plaintiff and the first defendant were equal shareholders and the only directors of the second defendants which were incorporated 20 June 1988. The second defendants were at all times managed by the first defendant. In these proceedings, the plaintiff has claimed that the first defendant had fraudulently obtained in his own name a tenancy of premises known at #06-48 Lucky Plaza ('the premises') which the shareholders had previously agreed to vest in the second defendants. The premises belonged to the third defendants and the tenancy was for a term of three years, with an option to renew for another two years, commencing on 15 August 1988 at a monthly rent of $35,000. The tenancy turned out to have been a very lucrative asset as the premises could be and were licensed at a considerable profit to a large number of stallholders to sell food in the premises.

Accordingly, the plaintiff has in this action claimed, inter alia, a declaration that the tenancy was held by the first defendant in trust for the second defendants.

Two days after the writ was filed, ie on 3 October 1988, the plaintiff obtained an order of court appointing receivers and managers ('the receivers') to receive all licence fees and other moneys payable in respect of the various foodstalls run by the licensees, the assets and property of the second defendants and to manage the second defendants as a going concern.

In response to this action and the appointment of receivers, the first defendant wrote to the landlords on 11 October 1988 giving notice of his intention to terminate the tenancy on 14 October 1988 on the ground that he would not be able to pay the rent for October 1988. On 15 October 1988, the first defendant informed all the stallholders that the tenancy had been terminated and that they should seek permission from the landlords to continue their businesses in the premises.

Acting on this purported termination, the landlords on 15 October 1988 attempted to resume possession of the premises but were rebuffed by the receivers. Following this event, the plaintiff applied to court to amend the writ of summons by adding the landlords as the third defendants and the statement of claim to claim, inter alia, that the purported notice of termination of tenancy given by the first defendant was null and void. The said application was granted by the court on 14 November 1988.

However, another event had occurred prior to 14 November which gave rise to the application before me. On 11 November 1988, the second defendants were, by an order of court in Originating Petition No 149 of 1988, placed under judicial management under Part VIIIA of the Act. The receivers were appointed the judicial managers.

It was conceded by counsel for the plaintiff that when the third defendants were added as a party to this action on 14 November 1988, the plaintiff had not requested the judicial managers to institute proceedings against the third defendants.

On this basis, counsel for the third defendants made this application to set aside the order of court joining them as a party to this action on the ground that the rule in *Foss* v *Harbottle*[1] applied and that the plaintiff had no locus standi to act as plaintiff in order to join the third defendants as a party to the action. Counsel submitted that by reason of ss 227D, 227G and Sch 11 of the Act, any cause of action which the second defendants might have against the third defendants became vested in the judicial managers, and therefore, until and unless the judicial managers had refused to institute proceedings, the plaintiff could not do so in his own name or on behalf of the second defendants. The said statutory provisions read as follows:

227D (1) On the making of a judicial management order —

(a) any receiver or receiver and manager shall vacate office; and

(b) any petition for the winding up of the company shall be dismissed.

...

(4) During the period for which a judicial management order is in force

...

(c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with leave of the Court and (where the Court gives leave) subject to such terms as the Court may impose;

277G (1) On the making of a judicial management order, the judicial manager shall take into his custody or under his control all the property to which the company is or appears to be entitled.

(2) During the period for which a judicial management order is in force, all powers conferred and duties imposed on the directors by this Act or by the memorandum or articles of association of the company shall be exercised and performed by the judicial manager and not by the directors; but nothing in this subsection shall require the judicial manager to call any meetings of the company.

(3) The judicial manager of a company —

(a) shall do all such things as may be necessary for the management of the affairs, business and property of the company; and

(b) shall do all such other things as the Court may by order sanction.

(4) Without prejudice to the generality of subsection (3)(a), the powers conferred by that subsection shall include the powers specified in the Eleventh Schedule.

Eleventh Schedule — Powers of Judicial Manager

The judicial manager may exercise all or any of the following powers, namely:

...

(c) power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

Counsel also referred to the decision of Walton J in *Fargo* v *Godfroy*[2] where it was held that a minority shareholder's action would not lie if a company was in liquidation: that the appropriate procedure in such a situation was for the liquidator to bring the action on behalf of the company or, if he refused to do so, a contributory might apply for an order authorizing him to bring the action in the company's name or compelling the liquidator to do so on such terms as to indemnity as the court considered appropriate.

Counsel for the plaintiff submitted that the reasoning in *Fargro*[2] had no application to a case of judicial management as the latter situation was temporary in that the judicial managers' appointment would only be valid for an initial term of 180 days whereas a liquidation was a permanent affair, and that should the action remain pending after the discharge of the judicial managers, the circumstances in which leave would have been given would no longer exist and that it would be open to the first defendant to apply for the action to be dismissed as being unauthorized. I rejected this argument as it was based on the erroneous assumption that any court order giving leave to the plaintiff to sue in the name of the company was automatically revoked upon the revocation or expiry of the judicial management order.

In my view the reasoning in *Fargro*[2] was applicable to the circumstances of this case. The conditions which prevented the plaintiff from bringing a derivative action on behalf of the second defendants ceased to exist upon the making of the order for judicial management. By reason of ss 227D, 227G of and Sch 11 to the Act, the management of the second defendants vested in the judicial managers. They were the proper party to institute proceedings against the third defendants that the tenancy had not been terminated by the first defendant. Since the judicial managers had not been requested and therefore had not refused to commence this action against the third defendants, the plaintiff's position was not one which fell within any of the established exceptions to the rule in *Foss* v *Harbottle*.[1]

I therefore found that the third defendants' objection to the locus standi of the plaintiff was well taken and accordingly allowed the application with costs.

Application allowed.

Solicitors: *Warren Khoo & Co; Wee Tay & Lim; Chor Pee & Co.*

Reported by *Terence Tan Bian Chye*